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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Ms. J.P., et al.,

Plaintiffs,

v.

WILLIAM P. BARR, et al.,

Defendants.

Case No. 2:18-cv-06081-JAK-SK

Assigned to the Hon. John A. Kronstadt
and the Hon. Steve Kim

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' *EX PARTE*
APPLICATION TO STAY ALL
PROCEEDINGS PENDING
APPEAL**

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1 **I. INTRODUCTION**

2 This Court has already found that Plaintiffs have established, sufficient for the
3 purposes of entering a preliminary injunction, that “the trauma they experienced as a
4 result of the family separation policy will cause irreparable injury unless they are
5 provided with immediate care.” Order Certifying Class, Granting Preliminary
6 Injunction, and Denying Motion to Dismiss (“Order”), ECF Dkt. No. 251 at 42-43.
7 Through an *ex parte* improperly filed on the eve of the Thanksgiving holiday,
8 Defendants seek a stay in light of an administrative burden that is premised on
9 erroneous facts regarding the nature of the relief ordered by the Court, a burden that in
10 any event cannot outweigh the irreparable harm to class members.

11 A stay is discretionary, and for a Court to exercise that discretion a party has to
12 show a likelihood of success on appeal, that it will be irreparably harmed, and that the
13 equities of a stay tip in its favor. This Court has considered each of these in its Order,
14 finding that *Plaintiffs* are likely to succeed, that *Plaintiffs* – whom the Government
15 deliberately harmed by separating them from their children in order to deter asylum
16 seekers from seeking safety in the United States – would be irreparably injured, and
17 that the equities tipped in *Plaintiffs*’ direction. *See generally* Order. An administrative
18 burden on the government to come up with a plan to remedy a harm that it
19 intentionally caused cannot outweigh the injury that class members will suffer if relief
20 is still further delayed. The Court has addressed these points already, and a stay is not
21 appropriate.

22 Defendants’ *ex parte* application should be denied.

23 **II. PROCEDURAL HISTORY**

24 Defendants’ *ex parte* application, filed on the eve of a national holiday, comes
25 after months of repeated efforts to delay the proceeding, avoid timely resolution of the
26 dispute, and circumvent the government’s constitutional obligation found by this
27 Court to provide Plaintiffs and class members with the medical care they require due
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1 to the government's actions in separating them from their children.

2 **A. Defendants' Efforts to Delay Discovery**

3 This case comes before the Court in view of the devastating psychological
4 trauma suffered by Plaintiffs and class members as a result of Defendants' decision to
5 forcibly separate immigrant families at the U.S.-Mexico border. Given the multiplying
6 effects of this harm with each day the trauma remains untreated, delivering class relief
7 quickly is a pressing concern, a reality that this Court has already recognized. Order at
8 42-43 ("Plaintiffs have submitted substantial evidence to support the position that the
9 trauma they experienced as a result of the family separation policy will cause
10 irreparable injury unless they are provided with immediate care.").

11 In an effort to drive the case towards a timely resolution, Plaintiffs served initial
12 discovery requests on Defendants on January 10, 2019. Since that submission over ten
13 months ago, Defendants have sought to extend the deadline to respond to the requests
14 on ten separate occasions and have still refused to provide even the most basic
15 discovery including the list of class members (a list they have had to at least
16 substantially compile and provide to Plaintiffs in the *Ms. L.* action and still refuse to
17 produce here). *See* ECF Dkt. Nos. 183, 198, 213, 216, 223, 225, 228, 231, 237, and
18 238 (requesting extensions).

19 **B. The Order and Defendants' Request for Extension to Respond**

20 Following the collapse of extended settlement negotiations with the
21 government, this Court issued its Order on November 5, 2019, which: (i) granted
22 Plaintiffs' Motion for Class Certification, (ii) granted Plaintiffs' Motion for a
23 Preliminary Injunction to provide mental health screenings and trauma-informed
24 mental health to the Custody Subclass, and (iii) denied Defendants' Motion to Dismiss
25 in its entirety. *See* Order, ECF Dkt. No. 251. The November 5, 2019 Order further
26 establishes the urgency of the situation to Plaintiffs, and appropriately highlights the
27 pressing need for the government to promptly remediate the severe and obvious harms
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1 caused by Defendants' unconstitutional policy to separate immigrant families at the
2 U.S.-Mexico border.

3 Despite the urgency expressed by this Court in the November 5, 2019 Order,
4 Defendants have continued to pursue procedural delay. On November 19, 2019,
5 Defendants once again requested an extension, seeking an additional 30 days to
6 answer Plaintiffs' July 12, 2018 Complaint. *See* ECF Dkt. No. 257. Plaintiffs did not
7 oppose that extension request, even though Defendants already had over sixteen
8 months to consider the Complaint. Notably, Defendants' November 19, 2019 request
9 did not disclose any intention to pursue this *ex parte* application just over a week later.

10 C. The Instant *Ex Parte* Motion and Defendants' Bad Faith

11 Conduct

12 On November 27, 2019, the day before Thanksgiving Day, Defendants chose to
13 file the instant *Ex Parte* Application to Stay. Despite having clearly planned the filing
14 for weeks (the declarations supporting their brief were signed as early as November
15 13, 2019), Defendants first informed Plaintiffs' counsel of their intention to file this
16 application at 11:04 A.M. Pacific the same day they filed, but did not provide in that
17 communication a description of the basis for the relief sought or the reasons why relief
18 must be granted *ex parte*. *See* Declaration of Amy Lally in Support of Plaintiffs'
19 Opposition to Defendants' *Ex Parte* Application to Stay ("Lally Dec.") Exhibit A. In
20 that communication, Defendants expressed to Plaintiffs their expectation that
21 Plaintiffs respond to their motion "within 24 hours (or one court day)" following
22 service. *Id.*

23 Plaintiffs requested that Defendants provide them with additional information
24 concerning the Defendants' *ex parte* motion – as is required by Local Rule 17-19.1 (it
25 is the duty of attorneys to make a good faith effort to inform counsel of the "substance
26 of the proposed *ex parte* application") – and also to allow Plaintiffs more than a single
27 business day to respond. *Id.* Defendants proceeded to deny Plaintiffs' request, and, in
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1 explaining their rationale for the motion, provided no support or explanation for why
 2 Defendants either needed this stay or could not timely bring their request for stay by
 3 noticed motion. *Id.* The communication denying Plaintiffs' request for a suitable time
 4 to respond was provided at 4:45 P.M. PST, when Plaintiffs' counsel were already
 5 traveling for Thanksgiving, and providing Plaintiffs with no time to prepare for
 6 responding over the holiday weekend. *Id.* The Application itself and supporting
 7 documents were filed electronically later that evening.

8 The full correspondence including Plaintiffs' offer of a reasonable briefing
 9 schedule and efforts to glean the substance of Defendants' application is attached as
 10 Exhibit A to the Lally Declaration filed concurrently herewith.

11 **III. Argument**

12 **A. The Requested Stay Is Unnecessary and Inappropriate**

13 The standards for a stay are clear, and they do not favor a stay in this instance.
 14 *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (per curiam),
 15 *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017), *amended and*
 16 *superseded by*, 858 F.3d 1168 (9th Cir. 2017), *cert. denied sub nom. Golden v.*
 17 *Washington*, 138 S. Ct. 448, 199 L. Ed. 2d 331 (2017) ("Our decision is guided by
 18 four questions: '(1) whether the stay applicant has made a strong showing that he is
 19 likely to succeed on the merits; (2) whether the applicant will be irreparably injured
 20 absent a stay; (3) whether issuance of the stay will substantially injure the other parties
 21 interested in the proceeding; and (4) where the public interest lies.'") (*quoting Lair v.*
 22 *Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012)).

23 These are questions that the Court considered, less than a month ago, in its
 24 Order. In granting the Preliminary Injunction, the Court found that Plaintiffs were
 25 likely to succeed, that Plaintiffs would be irreparably injured, and that the public
 26 interest favored Plaintiffs. *See Generally* Order. Defendants offer nothing new in
 27 support of their *ex parte* application to stay that this Court has not already considered
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1 and ruled on in its Order. In addition, even had Defendants offered anything new, a
 2 stay is “not a matter of right, even if irreparable injury might otherwise result.”
 3 *Washington* at 1164 (*quoting Nken v. Holder*, 556 U.S. 418, 433 (2009)).

4 Here, as the Court noted, delay will further injure Plaintiffs and their children
 5 who were forcibly separated by Defendants without regard for their mental health.
 6 Order at 42-43. Defendants lay out all sorts of supposed harms that they would
 7 endure. In the first place, none of these purported harms can outweigh the irreparable
 8 harm that the Court has found that class members are likely to suffer in the absence of
 9 preliminary relief. As the Court noted in its Order, quoting Plaintiffs’ expert Dr. Bruce
 10 Perry, “The longer such [trauma] interventions are delayed, the greater the negative
 11 cumulative effect the acute neurophysiological, neuroendocrine, and
 12 neuropsychological response will have on these children and their parents.” Order at
 13 10. *See also* ECF Dkt. No. 46, Decl. of Marleen Wong at ¶ 25 (“It is essential to
 14 intervene and treat the trauma as early as possible so that the child can function
 15 adaptively and feel less consumed by the traumatic event.”); ECF Dkt. No. 51, Decl.
 16 of Luis H. Zayas at ¶ 28 (recommending that “screenings, assessments, and family
 17 and individual treatments be implemented *as soon as possible*.”).

18 The purported burdens on Defendants to begin to remedy the harm that they
 19 intentionally caused cannot outweigh the long-term effects to Plaintiffs and their
 20 children of a continued failure to assess and treat class members for trauma. *See* Order
 21 at 44 (“There is no evidence that the proposed relief would impose unreasonable
 22 financial burdens on the Government. Moreover, the costs to the Government will be
 23 the result of its actions and the resulting, claimed adverse effects on Plaintiffs.”).

24 Furthermore, Defendants’ supposed injuries assume a particular format for
 25 relief to Plaintiffs and their children (*i.e.* that the Public Health Services will need to
 26 be deployed in a “massive public health delivery system” and ICE will need to
 27 transfer detainees), but they offer no evidence that this is a clinically indicated remedy
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1 that is able to provide relief to class members. In fact, Plaintiffs submit that an NGO,
 2 such as the Seneca Family of Agencies, is more suited to provide the outreach and
 3 treatment contemplated by the Court, and they could provide such relief without any
 4 of the troubles put forth by Defendants, if Defendants simply chose to pay for the care
 5 ordered. *Cf* Order at 32 (an injunction is still appropriate under the APA if even if it
 6 requires the expenditure of resources). *See also* Berrick Decl. at ¶ 8 (“In light of the
 7 trauma that class members have already suffered, it is critical that an outreach to this
 8 population be conducted in a trauma-informed and culturally appropriate manner. For
 9 this reason, such outreach must be conducted by individuals not associated with the
 10 government, whom class members are likely to associate with the trauma they
 11 experienced and who may be perceived as threatening or intimidating.”). Agreeing
 12 upon the details of this relief structure was the goal of the meet and confer process
 13 included in the Order, which Plaintiffs participated in fully in good faith. *See* Dkt. No.
 14 260 at 5, 8-9, 14 (describing the work Seneca could do). Nevertheless, the fact of the
 15 availability of NGOs such as Seneca shows Defendants’ arguments of injury to be a
 16 straw man that, like Defendants’ other arguments, have been addressed in this Court’s
 17 Order.

18 For all the reasons extensively stated in this Court’s Order, Defendants are not
 19 likely to succeed on appeal, and the continuing irreparable harm is being suffered by
 20 Plaintiffs not Defendants. The relief Defendants seek is extraordinary and the harm
 21 caused to the class is far more severe than any administrative burden upon the
 22 federal government. Should the Court require more information regarding the burden
 23 on the federal government and the harms to class members if relief is further delayed,
 24 Plaintiffs request an additional four days to provide the Court with declarations from
 25 pro bono expert consultants.

26 **IV. Conclusion**

27 Plaintiffs are parents whose children were forcibly separated from them by
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1 Defendants causing intense mental health trauma. This separation was
2 unconstitutional. Causing this trauma was a deliberate constitutional violation.
3 Plaintiffs suffered and continue to suffer irreparable injury. The Court has already
4 addressed each of these points in its Order and should deny the *ex parte* application.
5 Should the Court require additional information before ruling on this motion to stay,
6 Plaintiffs request the opportunity to file additional expert declarations by Friday,
7 December 6.

8 DATED: December 2, 2019

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9
10 By: /s/ Amy P. Lally

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CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 1999 Avenue of the Stars, 17th Floor, Los Angeles, California 90067.

On December 2, 2019, I served the foregoing document(s) described as **PLAINTIFFS' OPPOSITION TO DEFENDANTS' *EX PARTE* APPLICATION TO STAY ALL PROCEEDINGS PENDING APPEAL** on all interested parties in this action by the method described below:

I electronically filed the foregoing with the Clerk of District Court using its CM/ECF system, which electronically provides notice.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Amy P. Lally
Amy P. Lally
Attorney for Plaintiffs